United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May 31, 2005

TO : Gerald Kobell, Regional Director
Region 6

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

530-6033-7070-5000

SUBJECT: Rood Trucking Company, Inc.
Case 6-CA-34491

This Section 8(a)(5) case was submitted for advice on whether the parties were still at impasse after two years since the last bargaining session, and whether the Employer was privileged to refuse to meet with the Union unless the Union first presented a new proposal.

We conclude that the parties were still at impasse when the Union sought to resume negotiations, and therefore the Employer was privileged to refuse to bargain in the face of the Union's failure to present a new proposal.

FACTS

The Employer operates a trucking company that subcontracts with the United States Postal Service ("USPS") to deliver mail between USPS bulk mail centers located in Pennsylvania, Ohio and New York. The Union (Pittsburgh Metro Area Postal Workers Union a/w American Postal Workers Union, AFL-CIO) represents a bargaining unit of the Employer's drivers and maintenance employees. The Union was certified on February 27, 2001, and the parties have been unsuccessful in reaching an initial contract. The Region found that the parties have been at impasse since at least August 2002,[1] though the Employer has not implemented its final contract offer.

On January 23, 2004,[2] the Employer filed for Chapter 11 bankruptcy protection. In early November, the Union engaged in a strike and picketing of the Employer's terminals that lasted four days. Following the strike, all striking employees returned to work and runs which USPS had taken away during the strike were returned to the Employer. During the month following the end of the strike, USPS re-bid the Employer's Rochester, New York, runs and awarded

[1] The Region determined the parties were at impasse in connection with its dismissal of an earlier case, 6-CA-34014, to which no appeal was taken.

[2] All dates hereafter are in 2004.

them to another company, costing the Employer two runs and twenty bargaining unit jobs. The Employer claims that the loss of the Rochester work was unrelated to the strike.

On November 16, Union chief negotiator Mark Dimondstein sent a letter to company president George Rood, Sr., requesting meeting dates and suggesting two dates in each of the following two weeks. Dimondstein did not indicate a reason for the proposed resumption of bargaining. The Employer's attorney, Mary Balazs, responded by letter dated November 19. Balazs stated that the parties were at impasse; that Dimondstein's letter did not indicate any change to the Union's bargaining position; and stated that the Employer's bargaining position had not changed. Balazs also asked that if the Union intended "to make significant movement toward [the Employer's] position," it should forward such proposals for her review to determine "whether a meeting would be productive."

Dimondstein responded to Balazs' letter on December 6 and reiterated the Union's desire to meet. He did not deny that the parties were at impasse but questioned whether time and events had broken the impasse. Dimondstein stated that the Union was "willing to change its bargaining position from its last 'economic' offer" and that the Union had "room to move on most of our major demands including health insurance, disability insurance and leave." He did not inform the Employer what, if any, changes it proposed to make.

By letter dated December 15, Balazs responded to Dimondstein. She reiterated that the parties were at impasse and took that position that the company was not obligated to resume bargaining unless impasse was broken by the Union providing new proposals or significant changes to its proposals on the table. She ended by asking the Union to "provide us with specific changes that you would make. If they meet the appropriate standards, we will schedule a meeting with you." The Union then filed this charge.[3]

ACTION

We conclude that the parties were still at impasse when the Union sought to resume negotiations, and therefore the Employer was privileged to refuse to bargain in the face of the Union's failure to present a new proposal.

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[3] Dimondstein did not respond to Balazs' December 15 letter, and the parties have had no further communication.

"A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective positions."[4] When such a deadlock is reached between the parties, the duty to bargain about the subject matter of the impasse merely becomes dormant until changed circumstances indicate that an agreement may be possible.[5] The Board does not require major changes in circumstances to find that an impasse has been broken,[6] but looks for "anything that creates a new possibility of fruitful discussions," even if it does not create a likelihood of agreement.[7] The Board has found that an impasse was broken by a strike,[8] a change in the union's bargaining position,[9] a change in negotiators,[10] and the passage of time.[11] No one of these factors alone will break an impasse, but the Board looks at all the circumstances to determine whether "conditions had changed materially from those existent at the time of impasse."[12]

We agree with the Region that circumstances have not changed sufficiently between these parties to break the impasse reached in August 2002. Neither the strike, the bankruptcy proceedings, nor the Union's request to bargain, indicate that discussions will be any more fruitful now then they were when they broke off in August 2002. Although a

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[4] Hi-Way Billboards, Inc., 206 NLRB 22, 23 (1973).

[5] Ibid.

[6] Airflow Research & Mfg. Corp., 320 NLRB 861, 862 (1996).

[7] Circuit-Wise, Inc., 309 NLRB 905, 921 (1992).

[8] Id. at 922; Transport Co. of Texas, 175 NLRB 763, 763 fn. 1 (1969).

[9] Circuit-Wise, 309 NLRB at 921; KIMA-TV, 324 NLRB 1148, 1152 (1997); Airflow Research & Mfg. Corp., 320 NLRB at 862-863; Serramonte Oldsmobile, 318 NLRB 80, 97-98 (1995), enf. denied in rel. part 86 F.3d 227 (D.C. Cir. 1996).

[10] KIMA-TV, 324 NLRB at 1152; Airflow Research & Mfg. Corp., 320 NLRB at 862.

[11] Circuit-Wise, 309 NLRB at 921; Airflow Research & Mfg. Corp., 320 NLRB at 862.

[12] O'Malley Lumber Co., 234 NLRB 1171, 1179 (1978), citing Transport Company of Texas, 175 NLRB 763 at fn. 1.

strike may break an impasse, here the strike lasted only four days and it appears that the parties returned to the status quo at its conclusion. It did not affect the Employer's business, the strikers' jobs were not filled by replacement employees, and it was unaccompanied by any change in the employees' terms and conditions of employment.[13] In these circumstances, it does not appear that the strike materially effected a sufficient change in either party's position to break the pre-existing impasse.

In addition, nothing about the Employer's pending bankruptcy petition would indicate a sufficient change in circumstances to break the impasse. In this respect, it is not clear what effect the bankruptcy proceeding will have on the Employer's economic position. In any event, it is "up to the Union, which sought a resumption of bargaining, to make a move to break the impasse."[14] Therefore, the Union must assess its own position in light of the bankruptcy filing and determine whether it is prepared to make any changes in its bargaining proposals, rather than placing the burden on the Employer to come to the table with a new bargaining position.

We also agree with the Region that the Union's request to renew bargaining is not a change in circumstances sufficient to break the parties' impasse. "The Board ... has indicated that a party's bare assertions of flexibility on open issues and its generalized promises of new proposals [do not clearly establish] any change, much less a substantial change in that party's negotiating position."[15] Here, although the Union has stated that it is "willing to change its bargaining position from its last economic offer," and that it had "room to move on most of [its] major demands," these vague entreaties were not sufficient to break the impasse. As in Holiday Inn Downtown, the Union failed to commit itself to a new position or a change in any specific proposal. In light of the Union's failure to substantiate its claim of flexibility and openness, it is impossible for the Employer to determine whether the Union's

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[13] Compare Circuit-Wise, supra, 309 NLRB at 921 (strike lasted 13 months, during which employer implemented a series of wage increases); Transport Co. of Texas, supra, 175 NLRB at 763 fn.1, and 768 fn. 17 (employer hired replacement drivers and increased wages during the strike).

[14] Transport Co. of Texas, supra, 175 NLRB at 767.

[15] Serramonte Oldsmobile, Inc., 86 F.3d at 233, citing Holiday Inn Downtown-New Haven, 300 NLRB 774, 776 (1990).

request constitutes a substantial change from its prior position in negotiations.[16]

Finally, in the absence of any intervening event to indicate a change in either party's position, the Board has never relied on the mere passage of time to demonstrate that resumed negotiations would be fruitful.

Accordingly, the Region should dismiss the charge, absent withdrawal.

B. J. K.

[16] See Pepsi-Cola-Dr. Pepper Bottling Co., 219 NLRB 1200 (1975).